Supreme Court, U.S.
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021219 FEB 18 2003

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No. 02-

IN THE

Supreme Court of the United States

CECG, INC.,

Petitioner,

v.

MAGIC SOFTWARE ENTERPRISES, INC. and
MAGIC SOFTWARE ENTERPRISES, LTD.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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96 pp

QUESTIONS PRESENTED

1. Does the US Court of Appeals have original jurisdiction to make findings of facts as was done in the case at bar?

2. If the U.S. Court of Appeals has jurisdiction to make initial findings of fact, whether as a result of a *de novo* review of the record or otherwise, is plaintiff entitled to at least one level of appeal from that court on the claim that the finding of fact is clearly, blatantly or otherwise erroneous?

3. Did the action of the Court of Appeals deny plaintiff its Seventh Amendment right to a jury trial as well as its substantive state right to a jury trial?

4. Does the Federal Court obtain good jurisdiction when a party to state court litigation ignores a contract provision that limits jurisdiction over the controversy to the state courts, and proceeds to remove the matter to the federal court system?

5. Is a party denied substantive due process of law if the court decides the case on an issue that neither side raised, addressed nor was given any opportunity to respond to?

6. If the purchaser of a computer software program negotiates a modification of the shrink wrap license with the seller of the program, can the seller later remove a state court suit to the federal courts and avoid the provision in the contract that places exclusive jurisdiction for litigation in the state courts?

7. Does the Supreme Court's supervisory function over the U.S. Court of Appeals extend to cases where the claim is that (a) the Court of Appeals never had jurisdiction to start with, (b) that the court exceeded its jurisdiction by making initial findings of fact, (c) that the procedures invoked by the court violated plaintiff's state and federal substantive right to a jury trial, (d) that the court decided the case on an issue that was never substantially addressed by either party and the parties were effectively denied the opportunity to address the issue, and (d) that the Court of Appeals made a blatantly erroneous finding of fact?

STATEMENT PURSUANT TO RULE 29.6

Petitioner CECG, Inc states that is has no corporate parents, and that no publicly held company owns 10% or more of CECG, Inc.'s stock.

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PETITION FOR A WRIT OF CERTIORARI

CECG, INC., Petitioner, by undersigned counsel, under appropriate rules of this Court, requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

This is a dispute involving a contract between (a) a computer software developer/owner known as Magic Software

Enterprises, Ltd. and its computer software distributor known as Magic Software Enterprises, Inc. and (b) CECG, Inc. the purchaser of the product. Suit was initially filed in the Superior Court of New Jersey, Law Division, Middlesex County on April 7, 2000, and removed by the respondents to the United States District Court for the District of New Jersey on May 10, 2000.

The opinions below are:

1. The U.S. District Court denied remand on February 16, 2001,

2. Upon completion of discovery denied a motion to reconsider the denial of remand, on December 11, 2001 and

3. The District Court granted Defendants' motion for Summary Judgment December 11, 2001,

4. The matter was appealed to the United States Court of Appeals for the Third Circuit which rendered an Opinion on October 8, 2002,

5. and denied rehearing/reconsideration November 19, 2002.

All decisions are unreported.

JURISDICTION

STATEMENT OF SUBJECT MATTER JURISDICTION

District Court: Plaintiff filed suit in the Superior Court of New Jersey, Middlesex County, which suit was removed by Defendants. Plaintiff insists that the District Court did not have jurisdiction as the contract between the parties required all disputes to be resolved in the Middlesex County Courts.

Plaintiff's application for remand was denied, as was the motion for reconsideration of the denial of remand once discovery was completed (which discovery revealed that crucial facts relied upon by the Judge in denying the initial motion for remand were proven erroneous).

STATEMENT OF APPELLATE JURISDICTION

Third Circuit Court of Appeals: Plaintiff appealed pursuant to FRAP 3, from the Final Judgment of the District Court dated December 12, 2001 and the denial of the motions for remand and reconsideration of the remand. The decision of the Third Circuit Court of Appeals is dated October 8, 2002. The Order denying the application for rehearing is dated November 19, 2002. This Petition for Certiorari is filed within the 90 days set forth in Rule 13, Rules of the Supreme Court of the United States.

Jurisdiction of this Court is invoked under 28 U.S.C. §§ 1291 and 1295(a).

STATUTORY PROVISIONS INVOLVED

The provisions of 28 U.S.C. § 1291 "Final decisions of district courts" and of 28 U.S.C. § 1295(a) "Jurisdiction of the United States Court of Appeals for the Federal Circuit," and of the New Jersey Uniform Commercial Code, NJSA 12A:2-207 and NJSA 12A:2-201(3)(c), and the Seventh Amendment to the United States Constitution are reprinted in Petitioner's Appendix.

STATEMENT OF THE CASE

This case involves the Supervisory function of the U.S. Supreme Court over the U.S. Court of Appeals, and the denial of plaintiff's Seventh Amendment right to a jury trial as well plaintiff's substantive state right to a jury trial.

The Court of Appeals exercised questionable original jurisdiction by making a finding of fact not made by the court below, specifically that the contract between the parties did not contain a certain type of provision. The Appeals Court did not grant Plaintiff's request for oral argument and plaintiff was unaware and unable to respond to an issue that was not previously raised by the defendant nor the court below and therefore never briefed. That finding of fact was blatantly erroneous, and on application for reconsideration, the court of appeals refused to reconsider the matter. Either the contract- a single sheet, two-sided agreement- contains the provision that the court says is lacking, or it does not. Plaintiff believes that it is entitled to at least one level of appeal to correct a blatant error. If the disputed provision exists, then the parties agreed that any disputes were to be limited to the State Courts of New Jersey, and not to U.S. District Court which never had jurisdiction on day one (case had been removed by defendant from the Superior Court of New Jersey).

The wording of the documents was not disputed. The court stated the legal requirement that CECG could not make a material alteration to the contract

> "* * * unless CECG's purchase order indicated that "acceptance is expressly made conditional on assent to the additional or different terms." UCC § 2-207(1)."

That statement of the law is followed on the top of Page 11 of the Opinion with the factual finding, "The purchase order did not so indicate."

The Purchase Order dated January 10, 2000 states on the first page "Please Enter Our Order for the Goods Described herein, Subject to the Terms and Provisions Set Forth on the Face and Reverse Side of this Purchase Order."

The "Terms of Purchase Order" commences with term number 1, entitled "Acceptance" and reads as follows:

> "1. Acceptance. Commencement of performance pursuant to this Purchase Order constitutes acceptance hereof by Seller. If specified delivery dates cannot be met, Seller shall notify Buyer promptly of Seller's best alternative. The terms of this Purchase Order may not be modified, superseded or amended except in a writing signed by an authorized representative of Buyer. **Each shipment received by Buyer shall only be upon the terms of this Purchase Order, notwithstanding any terms contained in any quotation, acknowledgment, license agreement, invoice or other form of Seller, or Buyer's acceptance of, or payment for, any shipment or any other act.**" [emphasis added]

The language emphasized above and as contained on the front of the Purchase Order does precisely what the law requires, i.e. it makes acceptance of the purchase order expressly conditional on the acceptance of the terms of the Purchase Order, i.e. it indicates that "acceptance is expressly made conditional on assent to the additional or different terms." UCC § 2-207(1).

The actions of the motion judge at the District Court level, and the 3 judge panel at the Court of Appeals level, denied plaintiff its state substantive rights to a jury trial on the factual issues, as well as its Seventh Amendment right to a jury trial.

The actions of the Court of Appeals, in ruling on an issue that was never argued nor briefed by the parties, nor presented to the parties by the Court of Appeals, was also a denial of Plaintiff's basic and substantive right of due process.

Prior to any discovery in the case, Plaintiff made a motion to remand. Based on misrepresentations of fact made by the Defendant-Respondents, the motion judge denied the application to remand. After discovery was completed and the facts that the judge relied upon were proven erroneous, plaintiff moved for reconsideration of the motion to remand. That application was denied. The erroneous facts that the motion judge relied upon were that when the merchandise purchased by plaintiff was delivered, it was accompanied by a shrink wrap software license, presumably opened upon receipt and therefore accepted by plaintiff, that superseded the contract provisions of the Purchase Order and accompanying check previously submitted by plaintiff and accepted by the defendants.

Discovery revealed the following:

Plaintiff is a small software programmer who had previously purchased a software development engine called "Magic" and purchased a Royalty Free unlimited run time license from defendant. The development engine allowed Plaintiff to design software programs and the royalty free Unlimited Run Time License ("URTL") allowed Plaintiff to distribute the programs it designed without further charge or royalty by defendant. (See Opinion and Order). The "URTL" applied to programs developed by Plaintiff using the version of Magic development engine it purchased (version 2.5) and was extended without charge up to and including version 5 of the development engine, in 1990. (Opinion and Order).

Plaintiff originally chose to buy this product from among other similar products on the market because (1) it worked well, (2) allowed Plaintiff to distribute its software without royalties, and (3) was accompanied with the oral promise that each time Plaintiff purchased an updated version of the Magic Development Engine, that the URTL would apply to the new

version of Magic. (See Opinion and Order). Magic Software Enterprises still recognizes Plaintiff's "unlimited" URTL today through Version 5.02, and plaintiff was still using the Magic engine through 1999. (Opinion and Order). What Plaintiff's Purchase Order did was allow Plaintiff to use the newest version of the development engine and distribute the resulting software without royalty payment. The only difference between what Plaintiff could do before the purchase and after the purchase is that the new development engine (the "upgrade"- see Opinion and Order) allows Plaintiff to produce software with more bells and whistles (new features) than the software plaintiff wrote with the older version of the program.

One of plaintiff's customers, who was using a program designed by Plaintiff using the older version 5, requested some changes in his program. In order to make the requested changes, Plaintiff had to purchase the current version of the program called Magic version 8. Before making the purchase, Plaintiff requested a copy of the current license for version 8 and a demo or evaluation program for version 8. (Opinion & Order).

Plaintiff received the demo program which worked until January 2000. (Opinion and Order). At that time the license expired and the time limitation built into the program caused it to cease functioning.

After evaluating the product, Mitch Geier, president of Plaintiff, negotiated to purchase the new development engine (and some technical support) (Opinion and Order) but only on condition that certain license terms were modified. Plaintiff discussed with the Salesperson, Kelly Urschel, that he had been involved in prior litigation with Magic.

He advised her that Plaintiff was interested in purchasing version 8, but that he had to make changes to the terms and

conditions of the sale by submitting a Purchase Order. He advised the salesperson that he could not just give her a credit card (Opinion and Order), but would send in a Purchase Order with modified terms and conditions that were integral to the deal. Kelly Urschel testified at depositions that she did not recall the specifics of the conversation other than asking for the credit card. Plaintiff then sent in a Purchase Order dated January 10, 2000, which contained the modifications to the license. The relevant modifications of the license were that:

> (1) Plaintiff's existing unlimited run time license (URTL) would apply to version 8
> (2) If new versions of the development engine were introduced, the URTL would apply provided that Plaintiff purchased the new development engine, (see Opinion and Order)
> (3) Lawsuits between the parties had to be in Middlesex County, New Jersey (Opinion and Order) (where Plaintiff's headquarters was located),
> (4) Any modification of the agreement had to be in writing SIGNED by both parties.

The Purchase Order and the check for $4,480 which referenced the Purchase Order were received, and accepted by the Vice President of Operations, Russell Taitz. Plaintiff's check cashed ("retained CECG's payment" Opinion and Order), and Defendant then orally notified Plaintiff that the Purchase Order had been accepted.

Plaintiff contends that the acceptance and cashing of the check creates a binding contract, see for example NJSA 2A:12-201(3)(c) [UCC § 2-201]. The record of the sale would normally be kept in the Accounting Department of Magic Enterprises and the person in charge of the Accounting Department was Russell Taitz.

It is Plaintiff's position that at that point, a firm-binding contract existed between the parties, and that the applicable license was as set forth in the Purchase Order (or the demo license as modified by the Purchase Order).

Defendant then faxed to Plaintiff certain keys and codes, i.e. the Product Authorization Key or PAK that was an integral part of the software product, (Opinion and Order) necessary to re-activate the demo or evaluation software into a fully operational product. This fax did not purport to add any new terms, delete any old terms, or in any way change or modify the license agreement, which the parties had agreed upon. The fax specifically denied being a license agreement, "This document does not constitute a software license" and went on to state that the keys and codes were being provided subject to the "license terms applicable" (Opinion and Order) to the software. Neither was there any consideration tendered by defendants in exchange for the imposition of any new terms. Plaintiff did not sign any modification agreement or fax. The "applicable" terms were those set forth in the Purchase Order. Since there was a writing with all the terms agreed upon (i.e. the Purchase Order), Plaintiff contends that the court erred by consideration or reference to other documents (i.e. the fax of the keys and codes and the expired license which accompanied the demo program) NJSA 2A:12-202.

When Defendant's salesperson, thereafter "shipped" (Opinion and Order) discs and presumably a new shrink wrap license, keys and codes, she acknowledged in depositions that the shipment was a "Mistake" since she had already faxed him the necessary keys and codes; she acknowledged in writing that the shipment was a "Mistake" and she directed plaintiff to disregard the shipment.

In reliance on the contract (purchase order), Plaintiff expended great amounts of time and resources in learning the new version of Magic, and writing code in the new version. Plaintiff spent several thousand hours re-writing code, importing old data to the new program, testing, and learning the new program of Magic 8.0. His hourly rate was $96-$120 per hour at the time. Plaintiff developed software with the intent to distribute it without charge as part of a marketing plan including distribution via the internet, what he characterized as "freeware." If plaintiff cannot market the product plaintiff has produced, all the time spent on it and the time developing the marketing plans will be lost, and plaintiff will suffer incalculable economic loses. Also, plaintiff now has customers operating their business on the programs written in the new version; those customers are now dependent on the software and are unable to revert to the previous version of the program as their data is now in the new program.

All of the above is undisputed. So why was there a problem you may ask.

After several months of writing programs using version 8 of Magic, Plaintiff discovered some problems with the software and sought assistance. (Opinion and Order). At that time, Plaintiff was advised that the Defendant "refused" to provide the assistance (Opinion and Order), claimed that it did not wish to honor the terms of the Purchase Order.

First, the Defendant's Vice-President claims he never received the second page of the Purchase Order containing the terms and conditions. The face page of the Purchase Order clearly says that it is subject to the terms on the reverse side. When asked to produce the original Purchase Order at depositions in California, the Vice President produced a one-page document, with the terms and conditions on the reverse

side of the one page document. He was unable to explain how he never got the second page, as it was a one-page document.

Vice President Russell Taitz, testified at depositions that Kelly Urschel was authorized by Magic to negotiate the sale in question within certain parameters, which parameters were not in writing, and that there were no written guidelines that would delineate the extent or scope of her authority. He acknowledged that the Purchase Order and the check which accompanied it were received by Magic on January 12, 2000. He was asked whether he deals with the terms of any purchase order and he responded, "I absolutely deal with the terms of purchase orders." Vice President Taitz based his refusal to honor the terms of the Purchase Order on his belief, under oath, that Magic never received the page that contained paragraph #4 (the condition that Magic would recognize the URTL as applying to Version 8 and later versions). Specifically Russell Taitz testified that he never received the second page of the Purchase Order containing the terms and conditions, i.e. "That we did not receive this page, the second page to P-4. [Purchase Order of January 10, 2001]," Mr. Taitz was then asked to retrieve the original Purchase Order from his records (the deposition was being conducted at Magic Enterprises Inc. headquarters in Irvine, California). When Mr. Taitz returned with the company's orange colored folder containing the original Purchase Order, Mr. Taitz was asked the following:

> Q. "* * * First of all, the original letter head on CECG, the Purchase Order, the notation in the lower left-hand corner about the terms and conditions on the reverse side. Is that on the original you have?"
> A. "Yes it is.
> Q. "And the Purchase Order appears to be a one-page document with terms and conditions or what

are called Terms of Purchase Order being the second side of that document. Correct?"

A. "Correct."

Mr. Taitz's mistake was a unilateral mistake and then acted upon it by refusing to honor the contract. His testimony established that he admitted to having made this unilateral mistake. The Judge noted this acknowledgment in his Opinion and Order saying that "MSE has explicitly conceded for the purposes of this motion that the Purchase Order had two sides, both of which were received by MSE." The Judge acknowledges that plaintiff raised the issue of unilateral mistake (Opinion and Order). The court either rejected or just ignored "unilateral mistake."

When Mr. Taitz realized that the original Purchase Order which he held in his hands was really a one page document, he attempted to shift gears, and expressed doubt as to whether and when the Purchase Order and check were received. He was then asked to retrieve the company records as to the date of receipt of the Purchase Order and Check and when he returned, the records which he produced showed that the Purchase Order and Check were both received on January 12, 2000.

Secondly, defendant and its attorneys wrongly assumed that there was a third license agreement or shrink wrapped license that Plaintiff received along with the keys and codes (thus leading to their legal analysis of the applicability of certain UCC Title 2 provisions dealing with conflicting terms of agreement). While a package was shipped from Defendant to Plaintiff on January 13, 2000 sometime after the faxing of the keys and codes, Plaintiff immediately called the salesperson involved in the transaction to inquire about the shipment in the box, only to be told that it was a "Mistake" since she had already supplied the keys and codes, and she directed Plaintiff to ignore

it and dispose of it (the package was never opened and was produced at depositions of Plaintiff's President in it's still unopened condition). This unopened package may very well contain another shrink-wrapped license, but since the package has never been opened, we do not know what precisely it contains. The Judge below assumed that such a license was "received," and he proceeded to give it effect, even though it did not comply with the contract requirement that any changes had to be in a writing signed by both parties. Also produced at depositions was another fax from the salesperson acknowledging that the package shipment was a "Mistake."

Thirdly, the Defendant has apparently changed it marketing strategy and claims that it no longer sells URTLs, although it acknowledges that it still recognizes the right of programmers who received URTLs for version of Magic 5.02 and prior, to continue to write programs without any royalty to Defendant. The reason that defendants still recognize or honor the URTLs is that the customer owning them paid their one-time royalty fee. Geier testified that he never asked if Magic was selling URTLs and was never told that they were not selling URTLs. It would not matter anyway, as he still owned one.

On motion for remand, the judge originally accepted the defendant's mistakenly assumed facts that were based upon the fallacious assumption that a third license agreement accompanied the keys and codes. (Opinion & Order of February 16, 2001). The acceptance of that mistaken assumption resulted in the denial of Plaintiff's motion to remand to the Superior Court of New Jersey, Middlesex County (where the suit was originally filed) since the non-existent third license agreement would have eliminated the requirement for venue in Middlesex County and substituted Orange County, California. (Opinion & Order of February 16, 2001). The Judge assumed that Geier

opened the package and thereby accepted the terms of the license in it. (Opinion & Order of February 16, 2001).

On the motion for reconsideration, the court came to the same result but this time by way of postulating that the fax of the keys and codes was referencing the original shrink wrapped license when it used the phrase "license terms applicable" to the software. The Judge agreed with the defendants' argument that by using the new keys and codes, the terms of the original license continued to govern the use of the software. "Defendants argue that it {the original license} continued to govern the use of its software once the Plaintiff resumed use of the product. We agree." (Opinion & Order). Such an analysis is prohibited by the terms of the Purchase Order, which requires all future changes to be in a writing signed by the parties. The reason that Plaintiff insisted on this condition of SIGNED written changes was the prior ruling of Judge Lifland, when he dismissed a prior suit between the same parties in September 1996, because the condition in question in that suit was an oral promise by Defendant and therefore unenforceable in violation of the Statute of Frauds. The requirement for a signed writing to modify the agreement was also designed to avoid any "last shot" problem. The term "last shot" is a legal term of derision applied to a writing after there is a firm binding contract, which purports to modify the contract.

Also in denying reconsideration, the court felt bound by its mistakenly assumed facts from the original motion for remand — Even though the fact that the shipment of a package, well after the supplying of the Keys and Codes, acknowledged by Defendant as being a "Mistake," was NEVER OPENED. This fact was a crucial fact not developed until depositions in the normal course of discovery, well after the timely motion for remand. Further, the Court totally ignored the contractual term that any change had to be in a writing signed by the parties.

Once the Purchase Order was accepted and the check cashed by the Vice President of the Defendant, and the keys and codes faxed to Plaintiff, the contract was complete. The terms of the Purchase Order prevented any further license changes, "This supersedes all past and future shrink-wrap licensing agreements." There is no applicable "last shot rule." The trial court only looked at the provision of the Purchase Order that dealt with the URTL. The court ignored the crucial term of a writing *signed* by the parties. The parties' conduct – specifically the defendant's acceptance of the Purchase Order, cashing the check, and faxing the keys and codes, "establishes a contract." That contract is the original shrink-wrapped license as modified by the Purchase Order. The Contract has not been changed by any writing signed by the parties as required by the Purchase Order. No objection to the terms was made for months after the keys and codes were supplied by Defendant. How could the Defendant object to terms and conditions it never even read or never knew existed? What kind of strange fiction is the court engaging in to re-write the contract and reinstate the original shrink wrap license without the terms and conditions of the Purchase Order

For the lower courts to delete the requirement of a writing signed by the parties, before there can be any changes, is to write a better contract for the Defendant than it entered into. We are not dealing with a "series of correspondence" as suggested by the trial judge. Rather, we are dealing with either a license agreement as modified by the Purchase Order, or just a Purchase Order.

Plaintiff was not trying to buy something that the Defendant did not previously sell and still recognizes. Plaintiff agreed to pay the current price for the new development engine for version 8 and also paid for technical support. Plaintiff already owned an URTL. Plaintiff paid a one-time fee for the URTL. Defendant

still recognizes the ability of Plaintiff to use that URTL on software which plaintiff writes and sells or gives away. A crucial term of the purchase was simply that defendant recognize the URTL for the new development engine. (Purchase Order Term #4).

The practice of recognizing the URTL for any purchase of a new version of the development engine had been the practice of the defendant up through version 5 of Magic. That practice was contained in numerous oral promises made to the developers who purchased the product and were ready to testify as to the oral promise. Much to the surprise of those developers, the oral promise on which they relied was held to violate the Statute of Frauds and was therefore unenforceable, resulting in the dismissal of any suits to enforce that promise.

Plaintiff had been admonished by Judge Lifland that if there was to be a promise which plaintiff wanted to enforce, then plaintiff had better get it in writing. Plaintiff learned the lesson which the Judge had taught, and when plaintiff sought to enforce the promise- now in writing- a new judge says to him that the promise will not be enforced for reasons that the plaintiff cannot understand.

Plaintiff's potential economic loses are huge. Plaintiff seeks essentially enforcement of the contract, i.e. injunctive style relief rather than money damages. The benefit of the bargain is that plaintiff can create software programs in Magic without the payment of any royalties, for as many programs and for as many "stations" as plaintiff desires (whereas prior to the purchase in January 2000, plaintiff could do that for Magic ver. 5.02c only). The benefit of the bargain is also that plaintiff may now distribute sample programs for free to potential customers without limit on the internet or otherwise without the payment of royalties to Magic, and plaintiff has developed programs for that purpose which it cannot distribute until this litigation is completed.

How is a small developer to protect its interests? Should a simple business transaction require the cost or intervention of an attorney?

When plaintiff appealed to the Court of Appeals, plaintiff requested oral argument in order to be able to respond to any concerns that the judges might have, especially as to facts which the parties had lived with for years, but the judges only a short period of time.

The Court of Appeals overlooked or misapprehended the fact that the Purchase Order given by plaintiff to defendant does contain the precise language which that court proceeded to rule as a matter of fact, was not given. The opinion of the Court was based upon a finding of fact made by the Court of Appeals in the first instance, not the District Court below, and that finding of fact is patently and grossly erroneous. Plaintiff requested oral argument to avoid the very situation which arose, i.e. the Court basing its decision on an assumed set of facts which is incorrect, and which could have been easily addressed at oral argument. The Court of Appeals wrongly assumed that plaintiff, when he submitted his Purchase Order would not have written certain language in it because if he had, then it would be reasonable to assume that the defendant would not have accepted the Purchase Order. The language which the Court found did not exist in the Purchase Order is actually there. The reason why the defendant accepted the Purchase Order with language the court thought was not there, is simply that the Vice-President of the defendant company acknowledges that he did not bother to read the terms of the Purchase Order and even swore that the never received the second page – that is, he swore he never received it, until he turned the single page document over to see the second side during depositions!

The factual issue of whether plaintiff used certain verbiage or its equivalent is a material factual determination that plaintiff was entitled to have decided at a plenary trial. In the exercise of its supervisory function, this court has the right to review the legal issues based on the findings of fact made below and whether they were against the weight of the evidence, etc.

If this Court determines that the Court of Appeals exercised some form of original jurisdiction or as a result of a de novo review of the record made a finding of fact in the first instance, Plaintiff has no place to appeal to, other than the Supreme Court of the United States; and it is fundamental to our system of jurisprudence, that plaintiff have at least one opportunity to correct an original mistake by a court or trier of fact.

The Court of Appeals lacked jurisdiction of this suit, if plaintiff is correct in its factual assertion that the language which the Court of Appeals was looking for, does exist in the document entitled "Purchase Order." Plaintiff has always insisted that Plaintiff's Purchase Order is the only document or the controlling document by its very language. That language required any suit to be in Middlesex County New Jersey only.

The wording of the documents was not disputed. The court stated the legal requirement that CECG could not make a material alteration to the contract * * *

> "* * * unless CECG's purchase order indicated that "acceptance is expressly made conditional on assent to the additional or different terms." UCC § 2-207(1)."

That statement of the law is followed on the top of Page 11 of the Opinion with the factual finding, "The purchase order did not so indicate."

The Purchase Order dated January 10, 2000 states on the first page "Please Enter Our Order for the Goods Described herein, Subject to the Terms and Provisions Set Forth on the Face and Reverse Side of this Purchase Order."

The "Terms of Purchase Order" commences with term number 1, entitled "Acceptance" and reads as follows:

> "1. Acceptance. Commencement of performance pursuant to this Purchase Order constitutes acceptance hereof by Seller. If specified delivery dates cannot be met, Seller shall notify Buyer promptly of Seller's best alternative. The terms of this Purchase Order may not be modified, superseded or amended except in a writing signed by an authorized representative of Buyer. **Each shipment received by Buyer shall only be upon the terms of this Purchase Order, notwithstanding any terms contained in any quotation, acknowledgment, license agreement, invoice or other form of Seller, or Buyers acceptance of, or payment for, any shipment or any other act.**" [emphasis added]

The language emphasized above and as contained on the front of the Purchase Order does precisely what the law requires, i.e. it makes acceptance of the purchase order expressly conditional on the acceptance of the terms of the Purchase Order, i.e. it indicates that "acceptance is expressly made conditional on assent to the additional or different terms." UCC § 2-207(1).

The Court of Appeals did not explain why the language quoted above does not meet the test; the court either "overlooked or misapprehended" the clear language of the Purchase Order. The language quoted above even insists that it prevails

"notwithstanding any terms contained in * * * any license * * *." That language specifically addresses and deals with the court's concern that the demonstration disc was accompanied by a license (which license and software had expired and ceased to work prior to plaintiff even placing its order).

The erroneous factual determination, made by the U.S. Court of Appeals in the first instance, is the lynch pin upon which the decision rendered rests. Until that decision, there never was any dispute that the language was in the Purchase Order. The legal argument that the parties engaged in before the Court below was whether the UCC § 2-207 even applied to the Purchase Order.

REASONS FOR GRANTING THE PETITION

POINT 1

U.S. CIRCUIT COURT OF APPEALS DOES NOT HAVE ORIGINAL JURISDICTION TO MAKE FINDINGS OF FACTS AS WAS DONE IN THE CASE AT BAR.

The statutory jurisdiction of the US Court of Appeals is set forth in 28 U.S.C. §§ 1291, *et seq.* Both sections 1291 and 1295 make it quite clear that the jurisdiction of the court is appellate review. There is nothing in the statutes which gives the court original jurisdiction to make findings of fact. Making findings of fact is something intentionally left to the District Court which is designed to handle trials and motions for summary judgment. This is the way our system is designed.

Even a *De Novo* review of the record could not justify the factual finding that the contract in question does not contain the questioned provision. Since the matter was resolved on motion for Summary Judgment, there was no jury trial and the factual record was sparse. What little record there was had to

be viewed in the light most favorable to the plaintiff on a motion for Summary Judgment. The relatively sparse record, nevertheless clearly establishes that the factual determination was simply wrong.

POINT 2

IF THE U.S. CIRCUIT COURT OF APPEALS HAS JURISDICTION TO MAKE INITIAL FINDINGS OF FACT, WHETHER AS A RESULT OF A *DE NOVO* REVIEW OF THE RECORD OR OTHERWISE, PLAINTIFF IS ENTITLED TO AT LEAST ONE LEVEL OF APPEAL FROM THAT COURT ON THE CLAIM THAT THE FINDING OF FACT IS CLEARLY, BLATANTLY OR OTHERWISE ERRONEOUS.

It would appear that every litigant is or should be entitled to at least one level of appeal- whether that appeal is from a state county court of limited jurisdiction directly to the Supreme Court of the United States as in *Brown v. Texas*, 443 U.S. 47 (1979) or from an initial and blatantly erroneous finding of fact made in the first instance by the U.S. Court of Appeals.

POINT 3

THE ACTION OF THE COURT OF APPEALS DENIED PLAINTIFF ITS SEVENTH AMENDMENT RIGHT TO A JURY TRIAL AS WELL AS ITS STATE RIGHT TO A JURY TRIAL.

If the U.S. Court of Appeals has jurisdiction to make initial findings of fact by way of a *de novo* review of the record, but substantive State Law gives plaintiff a right to jury trial, the U.S. Court of Appeals should have remanded the matter for a jury determination of the disputed issues.

Not only is there an Seventh Amendment right to Trial by jury, but such a right is a substantive right which existed under the common law and which is provided by the State of New Jersey to its litigants. *Kugler v. Banner Pontiac-Buick, Opel, Inc.*, 120 N.J. Super. 572, 295 A.2d 385 (Ch. Div. 1972). When a judge or panel of judges make the critical findings of fact that cause a litigant to have its claim dismissed, that litigant is being denied the valuable substantive right which New Jersey has promised to its litigants. Right to trial by jury is more than a procedural matter.

It is fundamental that only where there are no disputed factual issues of consequence can a judge or judges grant a motion for summary judgment; otherwise the facts must be resolved by the jury. In this case, there was a crucial factual issue of whether the contract contained a certain provision or not. This was not a case of the court interpreting a specific clause; rather the Court of Appeals said that the clause did not exist at all. In that finding, the court was blatantly wrong.

POINT 4

IF A PURCHASER OF A COMPUTER SOFTWARE PROGRAM NEGOTIATES A MODIFICATION OF THE SHRINK WRAP LICENSE WITH THE SELLER OF THE PROGRAM, THE SELLER CANNOT LATER REMOVE A STATE COURT SUIT TO THE FEDERAL COURTS AND AVOID THE PROVISION IN THE CONTRACT THAT PLACES EXCLUSIVE JURISDICTION FOR LITIGATION IN THE STATE COURTS.

If the Court of Appeals was factually wrong, i.e. the contract did contain the clause which the court apparently overlooked, then the federal court system lacked jurisdiction to hear the case in the first instance. The contract, i.e. the Purchase Order,

specifically provided that any litigation was to be filed in the court system in Middlesex County New Jersey which was the home office of CECG, Inc.

POINT 5

FOR THE COURT OF APPEALS TO DECIDE THE CASE ON A GROUND THAT WAS NOT ARGUED NOR BRIEFED BY EITHER PARTY, NOR PRESENTED TO THE PARTIES BY THE COURT FOR ARGUMENT, IS TO DENY PLAINTIFF SUBSTANTIVE DUE PROCESS OF LAW.

Our courts have expressed "grave doubts" that an issue can be foreclosed which is "an issue never substantively addressed by the party against whom it was decided * * *" *Procanik by Procanik v. Cillo*, 226 N.J. Super. 132, 154, 543 A.2d 985 (N.J. Super. A.D. 1988).

POINT 6

THE CONTRACT BETWEEN THE PARTIES VESTED EXCLUSIVE JURISDICTION IN THE STATE COURT SYSTEM OF NEW JERSEY, AND THE FEDERAL COURT SYSTEM SHOULD NOT HAVE SANCTIONED THE REMOVAL.

This is a case of a State Court litigant evading a contractual provision that places exclusive jurisdiction for litigation in the state courts, and the already overburdened Federal Court system, taking on a case over which it did not have jurisdiction. The same contract that the U.S. Court of Appeals erroneously claimed to lack a critical contract provision making its terms the exclusive, contains a critical provision vesting exclusive jurisdiction in the courts in Middlesex County New Jersey. This matter should be remanded to that court system for trial.

POINT 7

SUPREME COURT'S SUPERVISORY FUNCTION OVER THE U.S. COURT OF APPEALS.

The Supreme Court's supervisory function over the US Court of Appeals extends to the case at bar where plaintiff claims that (a) the Federal courts never had jurisdiction to start with, (b) the U.S. Circuit Court of Appeals exceeded its jurisdiction by making initial findings of facts, (c) The District Court Judge violated plaintiff's state substantive and federal constitutional rights to a jury trial on findings of fact and/or (d) the initial fining of fact by the U.S. Circuit Court of Appeals is blatantly erroneous.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this court grant Petitioner its Petition for a Writ of Certiorari.

Respectfully submitted,

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